

**IN THE UNITED STATES BANKRUPTCY COURT FOR THE
EASTERN DISTRICT OF TENNESSEE**

In re

Case No. 03-33597

DOUGLAS L. YOUNG

Debtor

MEMORANDUM ON MOTION FOR SANCTIONS

APPEARANCES: THE TAYLOR LAW FIRM
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**RICHARD STAIR, JR.
UNITED STATES BANKRUPTCY JUDGE**

Before the court is the Motion for Sanctions (Motion) filed by Stevens Mortuary, Inc. (Stevens Mortuary) on December 24, 2003, seeking the imposition of sanctions against the Debtor, Douglas L. Young, under Rule 9011 of the Federal Rules of Bankruptcy Procedure for the improper filing of his bankruptcy case on June 27, 2003. Stevens Mortuary avers that the Debtor filed his Chapter 7 bankruptcy petition, which he allowed to be dismissed for failure to file his statements and schedules, simply for the purpose of delaying a discovery deposition in aid of execution that was scheduled for July 9, 2003. The court entered an Order on December 30, 2003, allowing the Debtor until January 20, 2004, to respond to the Motion; however, no response was filed.

The evidentiary hearing on the Motion was held on February 3, 2004. The record before the court consists of thirteen exhibits. The Debtor did not appear.¹

This is a core proceeding. 28 U.S.C.A. § 157(b)(2)(A), (O) (West 1993).

I

On June 29, 2001, Stevens Mortuary obtained a Default Judgment against the Debtor in the Knox County General Sessions Court in the amount of \$5,677.31 for breach of contract and failure to pay the expenses of his father's funeral (Judgment). TRIAL EX. 1. The Debtor

¹ Counsel for Stevens Mortuary informed the court that the documents served upon the Debtor with regards to this Motion were returned to his office, marked "attempted, not known." Counsel confirmed that all documents were sent via first class mail to the address supplied by the Debtor in his bankruptcy petition, which satisfies the requirements for service of process under Federal Rule of Bankruptcy Procedure 7004(b)(9), made applicable to this contested matter by virtue of Rule 9004(b) of the Federal Rules of Bankruptcy Procedure. See also *In re Lijoi*, 288 B.R. 511, 514 n.5 (Bankr. E.D. Tenn. 2002); *Tullock v. Hardy (In re Hardy)*, 187 B.R. 604, 609 (Bankr. E.D. Tenn. 1995).

did not appeal the Judgment, which became final on July 9, 2001. Stevens Mortuary, by and through its attorneys, sent interrogatories to the Debtor in order to obtain information in aid of execution upon its Judgment. TRIAL EX. 4. After the Debtor did not provide answers to the interrogatories, Stevens Mortuary served him with a subpoena duces tecum on June 12, 2003, scheduling a discovery deposition for July 9, 2003. TRIAL EX. 8. Subsequent to being served with the subpoena, the Debtor contacted counsel for Stevens Mortuary, stating that he would be out of town during the week preceding the deposition, that he was scheduled to return on July 8, 2003, and requesting a postponement of the deposition; however, because of the difficulties in cooperation between the parties, counsel for Stevens Mortuary refused to change the deposition date. See TRIAL EX. 10.

On June 27, 2003, the Debtor filed the Voluntary Petition commencing his Chapter 7 bankruptcy case. He did not file statements and schedules with the Voluntary Petition, and the court issued an Order on July 3, 2003, directing the Debtor to file his statements and schedules within the times prescribed by the Bankruptcy Code and the Federal Rules of Bankruptcy Procedure. The Debtor did not comply with this Order, and an Order of Dismissal was entered on July 21, 2003. A Final Decree closing the case was then entered on August 22, 2003. Stevens Mortuary filed a Motion to Reopen Case on September 16, 2003, and the case was reopened by Order entered October 15, 2003.

II

Federal Rule of Bankruptcy Procedure 9011 governs representations to the court and states, in material part:

(a) Signing of papers

Every petition, pleading, written motion, and other paper, except a list, schedule, or statement, or amendments thereto, shall be signed by at least one attorney of record in the attorney's individual name. A party who is not represented by an attorney shall sign all papers. Each paper shall state the signer's address and telephone number, if any. An unsigned paper shall be stricken unless omission of the signature is corrected promptly after being called to the attention of the attorney or party.

(b) Representations to the court

By presenting to the court (whether by signing, filing, submitting, or later advocating) a petition, pleading, written motion, or other paper, an attorney or unrepresented party is certifying that to the best of the person's knowledge, information, and belief, formed after an inquiry reasonable under the circumstances,—

- (1) it is not being presented for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation;
- (2) the claims, defenses, and other legal contentions therein are warranted by existing law or by a nonfrivolous argument for the extension, modification, or reversal of existing law or the establishment of new law;
- (3) the allegations and other factual contentions have evidentiary support or, if specifically so identified, are likely to have evidentiary support after a reasonable opportunity for further investigation or discovery; and
- (4) the denials of factual contentions are warranted on the evidence or, if specifically so identified, are reasonably based on a lack of information or belief.

(c) Sanctions

If, after notice and a reasonable opportunity to respond, the court determines that subdivision (b) has been violated, the court may, subject to the conditions stated below, impose an appropriate sanction upon the attorneys, law firms, or parties that have violated subdivision (b) or are responsible for the violation.

FED. R. BANKR. P. 9011 (footnote omitted).

Bankruptcy courts impose sanctions under Rule 9011 to deter parties from filing frivolous actions. *White v. Creditors Serv. Corp. (In re Creditors Serv. Corp.)*, 207 B.R. 567, 570 (Bankr. S.D. Ohio 1997). Thus, the bankruptcy court has broad discretion to determine whether sanctions are warranted. *Railroad Ctr. v. Thompson (In re Thompson)*, 165 B.R. 30, 32 (Bankr. M.D. Tenn. 1994). Nevertheless, in making its determination, the court “should avoid the wisdom of hindsight and objectively examine whether the [party] made a reasonable pre-filing inquiry that factually and legally supported the filing of the pleading.” *Creditors Serv. Corp.*, 207 B.R. at 570.

Rule 9011 applies to both attorneys and pro se litigants, holding both to the same duties. FED. R. BANKR. P. 9011(a); *see also McGahren v. First Citizens Bank & Trust Co. (In re Weiss)*, 111 F.3d 1159, 1170 (4th Cir. 1997) (“Rule 9011 does not exempt pro se litigants from its operation; a pro se litigant has the same duties under Rule 9011 as an attorney.”); *Zussman v. Smilgoff (In re Zussman)*, 157 B.R. 404, 410 (Bankr. N.D. Ill. 1993) (“While pro se litigants are frequently given latitude in the review of their filings, Rule 9011 is applicable to them.”). This is particularly true when a party’s “pro se status has been respected at all

stages of the proceedings,” and the pro se party “is clearly intelligent and articulate.” *Arleaux v. Arleaux (In re Arleaux)*, 229 B.R. 182, 186 (B.A.P. 8th 1999).

In essence, sanctions are appropriate if (1) the document or claim is not well-founded or (2) it was filed for an improper purpose. *In re Primary Health Servs., Inc.*, 227 B.R. 479, 486 (Bankr. N.D. Ohio 1998); *In re Robinson*, 198 B.R. 1017, 1023-24 (Bankr. N.D. Ga. 1996). A bankruptcy petition filed in bad faith may satisfy both requirements. *See, e.g., In re McCoy*, 237 B.R. 419, 422-23 (Bankr. S.D. Ohio 1999).

All bankruptcy petitions must be filed in good faith, and evidence of good faith includes complying with the statutory duties set forth in the Bankruptcy Code, including the filing of statements and schedules. *McCoy*, 238 B.R. at 422; *In re Freeman*, 224 B.R. 376, 379 (Bankr. S.D. Ohio 1998). “In determining whether a debtor has filed a case in good faith, the court must consider the totality of the circumstances surrounding the filing, including the timing of the filing[.]” *In re Duruji*, 287 B.R. 710, 713 (Bankr. S.D. Ohio 2003). The filing of a bankruptcy case for an improper purpose constitutes bad faith. *In re Grossinger*, 268 B.R. 386, 387 (Bankr. S.D.N.Y. 2001). “In determining whether a petition was filed for an improper purpose, the bankruptcy court must ask whether the [party’s] conduct was reasonable under the circumstances.” *In re Pannell*, 253 B.R. 216, 219 (S.D. Ohio 2000).

Based upon the exhibits entered into proof, the court finds that the Debtor filed his Chapter 7 bankruptcy petition in bad faith, and thus, sanctions are warranted. First, as an initial matter, the Debtor is not a “normal” pro se litigant. He is a former attorney, licensed

and subsequently disbarred by the State of California. See TRIAL EX.7. The Debtor obviously possesses substantial legal knowledge beyond that of a layperson, regardless of his current status with the California Bar.

Additionally, the court does not believe that the Debtor's Voluntary Petition was well-founded. His Chapter 7 case commenced upon the filing of the Voluntary Petition, along with his creditor matrix, his signed Verification of Creditor Matrix, and a \$200.00 filing fee. The creditor matrix listed Stevens Mortuary and its attorneys first and second among only twelve creditors. The Debtor did not file statements and schedules, and the court entered an Order on July 3, 2003, directing him to do so. Nevertheless, no statements and schedules were ever filed, and the case was dismissed on July 21, 2003, for failure to comply with this Order. Because no statements and schedules were filed, there is no information regarding his other creditors, what amounts they are owed, or if the Debtor actually owns any property. The Debtor's failure to abide by the statutory requirements, especially in light of the timing of his filing, provide adequate evidence that he did not intend to properly proceed in his Chapter 7 bankruptcy case.

Moreover, the court finds that the Debtor filed his bankruptcy petition for the improper purpose of delaying the discovery deposition and to further delay Stevens Mortuary's attempts to execute upon its Judgment through operation of the automatic stay. "Courts have also imposed Rule 9011 sanctions where the bankruptcy filing is motivated by the desire to delay a creditor from enforcing its rights in another court." *In re Smith*, 257 B.R. 344, 352 (Bankr. N.D. Ala. 2001).

Using the automatic stay and the filing of the petition as a shield to buy time . . . abuses the bankruptcy system. The harm which devolves is not limited to the affected creditor. By example and word of mouth, the “technique” spreads until it is no longer perceived by the Bar or by debtors as an abuse but as a permissible manipulation of the system. In the meantime, respect for the bankruptcy system, including attorneys who wish to assist honest debtors, deteriorates. When public respect for any part of the legal system falters, it harms everyone involved in the system.

Robinson, 198 B.R. at 1025.

Here, the Debtor has taken great steps to hinder Stevens Mortuary’s attempts to execute upon its Judgment including his refusal to accept interrogatories sent to him via certified mail, *see* TRIAL EX. 5, his failure to consider reasonable offers to settle the account, *see* TRIAL EX. 10, and his threats to file for bankruptcy if Stevens Mortuary continued in its execution attempts, *see* TRIAL EX. 11. Even more telling is his letter to counsel for Stevens Mortuary dated June 27, 2003, the date upon which he filed for bankruptcy, advising of the commencement of his Chapter 7 case, requesting \$250,000.00 in order to settle alleged claims of abuse and emotional stress, and stating that his claims against Stevens Mortuary and its attorneys “will be one of the only assets in my bankruptcy.” TRIAL EX. 12. Under a totality of the circumstances, the court agrees that the Debtor filed his Chapter 7 bankruptcy case solely to delay and hinder Stevens Mortuary’s attempts to discover assets in aid of execution upon its Judgment.

III

Having found that sanctions are appropriate, the court must also determine the proper amount. Sanctions must be “limited to what is sufficient to deter repetition of such conduct or comparable conduct by others similarly situated[,] . . . [including] payment to the movant of some or all of the reasonable attorneys’ fees and other expenses incurred as a direct result of the violation.” FED. R. BANKR. P. 9011(c)(2); *see also Robinson*, 198 B.R. at 1025 (“The amount of sanctions should be set at a level appropriate to deter future sanctionable conduct.”).

In this case, Stevens Mortuary has requested sanctions against the Debtor in the amount of \$12,588.42, consisting of attorneys’ fees of \$2,588.42 and \$10,000.00 in punitive sanctions. Under the guidelines of Rule 9011(c)(2), the court does not believe that \$10,000.00 represents the least amount sufficient to deter the Debtor from repeating this conduct.² However, the court agrees that Stevens Mortuary should be entitled to all of its attorneys’ fees in the amount of \$2,588.42 as an appropriate and warranted sanction.

² Rule 9011 authorizes the court to assess an additional sanction above reasonable attorney’s fees and expenses, if necessary to sufficiently deter future repetitive actions. *See* FED. R. BANKR. P. 9011(c)(2). Any additional award would be paid into the court and not to the moving or aggrieved party. *See DeVille v. Cardinale*, 280 B.R. 483, 498 (B.A.P. 9th Cir. 2002) (holding that because an award of additional sanctions constituted a penalty, it must be paid to the court); 10 COLLIER ON BANKRUPTCY ¶ 9011.09[1] (Lawrence P. King ed., 15th ed. rev. 2003) (“A monetary sanction will ordinarily consist of an order to pay a penalty into court.”).

An order consistent with this Memorandum will be entered.

FILED: February 5, 2004

BY THE COURT

/s/ Richard Stair, Jr.

RICHARD STAIR, JR.
UNITED STATES BANKRUPTCY JUDGE

**IN THE UNITED STATES BANKRUPTCY COURT FOR THE
EASTERN DISTRICT OF TENNESSEE**

In re

Case No. 03-33597

DOUGLAS L. YOUNG

Debtor

ORDER

For the reasons set forth in the Memorandum on Motion for Sanctions filed this date, the court directs the following:

1. The Motion for Sanctions filed by Stevens Mortuary, Inc., requesting sanctions against the Debtor Douglas L. Young under Rule 9011 of the Federal Rules of Bankruptcy Procedure, is GRANTED.

2. Sanctions are imposed against the Debtor Douglas L. Young in the amount of \$2,588.42, representing attorneys' fees incurred by Stevens Mortuary, Inc., in the prosecution of its Motion for Sanctions.

3. The Debtor will pay the sanctions awarded herein directly to Stevens Mortuary, Inc., and its attorneys, W. Andrew Fox and The Taylor Law Firm.

4. The sum awarded Stevens Mortuary, Inc., herein constitutes a judgment against the Debtor Douglas L. Young.

SO ORDERED.

ENTER: February 5, 2004

BY THE COURT

/s/ Richard Stair, Jr.

RICHARD STAIR, JR.
UNITED STATES BANKRUPTCY JUDGE